



Office of the Attorney General
State of Texas

October 11, 1996

DAN MORALES
ATTORNEY GENERAL

Mr. David A. Anderson
Chief Counsel
Texas Education Agency
1701 N. Congress Avenue
Austin, Texas 78701-1494

OR96-1864

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 101125.

The Texas Education Agency (the "agency") received a request for five categories of documents relating to an investigation performed by the agency. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.107, 552.117, 552.122, and 552.026 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note that, together with the submitted documents, the agency claimed for the first time that some of the submitted information was excepted from disclosure as investigative work product and that litigation is anticipated. However, these exceptions were not claimed within ten days from the date the agency received the request as required by law. Gov't Code § 552.301(a). As these exceptions were not timely claimed, they are waived. *See* Open Records Decision No. 473 (1987) (Gov't Code § 552.103 is not compelling reason to overcome presumption of openness); *see also* Gov't Code § 552.302.

You first claim that most of the submitted information is excepted from disclosure pursuant to section 34.08 of the Texas Family Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. We note that section 34.08 of the Family Code was repealed in the previous legislative session and replaced by section 261.201 of the Family Code.¹ Section

¹Section 261.201 was added to the Family Code in the last legislative session and became effective, as amended, on September 1, 1995. Act of April 6, 1995, 74th Leg., R.S., ch. 20, § 1, 1995 Tex. Sess. Law Serv. 113, 262 (Vernon); Act of May 25, 1995, 74th Leg., R.S., ch. 751, §§ 93, 129, 1995 Tex. Sess. Law Serv. 3888, 3924, 3933 (Vernon). We apply the new law, as the request for information was received by the governmental body after September 1, 1995.

261.201(a) of the Family Code provides:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report;

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

(Footnote added). You claim that section 13.046 of the Education Code works together with the provisions of section 261.201 of the Family Code. Section 13.046 of the Education Code, which appears to have been continued in effect during the transition to a state board for educator certification, addresses the suspension and cancellation of teachers' certificates. However, chapter 261 of the Family Code deals with investigations of child abuse and neglect. It does not appear to be related to investigations for suspensions or cancellations of a teacher's certificate. Therefore, the agency may not withhold the requested information under section 261.201 of the Family Code.

You also claim that privacy protects the submitted information. Section 552.101 encompasses both common-law and constitutional privacy. For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court stated that

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing statutory predecessor to Gov't Code § 552.101). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 (1987) at 4.

The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse or the detailed description of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have reviewed the documents submitted for our consideration and do not find that any of the information is protected from disclosure under either constitutional or common-law privacy.

You also claim that some of the information is protected under section 552.026 of the Government Code. That section provides:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain numerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" are those records, files, documents, and other materials which

- (i) contain information directly related to a *student*; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A) (emphasis added). A "student"

includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, *but does not include a person who has not been in attendance at such agency or institution.*

Id. § 1232g(a)(6) (emphasis added). Although the agency may be an “educational institution” for some purposes, it is not an institution attended by students. The records you seek to withhold under section 552.026 of the Government Code are not “education records” as defined by FERPA. Similarly, you have not provided this office with any arguments or evidence to establish that the Texas Higher Education Coordinating Board is an “educational institution.” Therefore, the agency may not withhold any of the submitted information under FERPA.

Federal law may prohibit disclosure of the social security numbers included in the submitted material. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). Based on the information you have provided, we are unable to determine whether the social security numbers are confidential under this federal statute. We note, however, that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information.

Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. *Id.* at 5. We have marked the information that the agency may withhold under section 552.107(1). As you have not explained how the other information submitted to this office for review falls within the scope of section 552.107(1), the agency may not withhold the remainder of the submitted information under section 552.107(1).

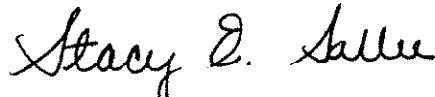
Section 552.122 excepts from disclosure “[a] test item developed by an educational institution that is funded wholly or in part by state revenue” and “[a] test item developed by a licensing agency or governmental body.” In Open Records Decision No. 537 (1990), this office determined that section 552.122 excepts the answer keys of a school district’s exam questions. In Open Records Decision No. 626 (1994), this office determined that the term “test item” in section 552.122 includes any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee’s overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 (1994) at 6. Section 552.122 may apply where release of “test items” might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). We conclude that certain of

the submitted information, the answers to the Texas Academic Skills Program test, may be withheld under section 552.122.

Although the agency claimed that the submitted information is excepted from required public disclosure under section 552.117, we were unable to find any information that falls within that exception. Section 552.117 of the Government Code excepts from public disclosure information relating to the home address, home telephone number, and social security number of a current or former government employee or official, as well as information revealing whether that employee or official has family members. Section 552.117 requires a governmental body to withhold this information for an official, employee, or former employee who requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). As we find no such information in the submitted materials, we conclude that the agency may not withhold any of the submitted information under section 552.117.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/ch

Ref.: ID# 101125

Enclosures: Marked documents

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(w/o enclosures)